NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

RAUL MEDRANO, TERESA J. LARA, FAUSTINO GARCIA, ALEJANDRO GARCIA, OLGA LEYVA VELARDE, and EFREN RAMOS FRAIDE, on behalf of themselves and all other persons similarly situated, Plaintiffs, v. D'ARRIGO BROTHERS COMPANY OF CALIFORNIA, Defendant.	Case Number C 00-20826 JF (RS) **ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT** [Docket No. 238]

Plaintiffs move for partial summary judgment as to the liability of Defendant D'Arrigo Brothers Company of California ("D'Arrigo") in this class action lawsuit.[1] The Court has read and considered the briefing and evidence submitted by the parties and has considered the oral arguments of counsel presented on February 27, 2004. For the reasons set forth below, the

[1] The Court has bifurcated this action into liability and damages phases. *See* Order Granting Motion for Bifurcation and Denying Request for Continuance, Docket No. 190.

motion will be granted.

I. BACKGROUND

Plaintiffs, current and former employees of D'Arrigo, are agricultural workers. D'Arrigo is engaged in the business of planting, harvesting, grading, packaging, packing, and processing vegetables. Plaintiffs allege that from 1996 to 2000, D'Arrigo did not accurately record or compensate them for all hours worked—in particular, hours that D'Arrigo required Plaintiffs to spend waiting and traveling to and from fields pursuant to D'Arrigo's mandatory work transportation policy. Under this policy, D'Arrigo required Plaintiffs to report to a designated departure point—the Spreckels Parking Lot—and to board buses operated by D'Arrigo. The buses then transported the workers to various work sites. Plaintiffs were not allowed to drive directly to a work site even if it was closer to their home than the Spreckels Parking Lot. At the end of the workday, Plaintiffs were not permitted to leave the work site immediately, but instead had to wait for the foreman to finish his or her administrative tasks before the bus could transport them back to the Spreckels Parking Lot.

Plaintiffs claim that D'Arrigo should have compensated them for this compulsory waiting and travel time, which includes the time spent riding the bus to the fields, waiting for the bus at the end of the day, and riding the bus back to the departure point. Plaintiffs contend that the legal effect of D'Arrigo's failure to compensate them for these activities is that they have not been paid wages due to them by law. D'Arrigo disputes Plaintiffs' claims. It argues that it compensated Plaintiffs for travel time via its "piece rate" payment scheme. D'Arrigo asserts that it sometimes paid laborers on the basis of the quantity of vegetables picked rather than the number of hours worked and that when it did so such "piece rate" payments included payment for mandatory travel and waiting time.

Plaintiffs now ask for summary judgment that D'Arrigo: (1) failed to pay wages due for mandatory travel and waiting time as required by California Industrial Welfare Commission ("IWC") wage order No. 14-80 ("Wage Order No. 14-80") (found at Cal. Code Regs., tit. 8, §

11140),[2] California Labor Code sections 201 and 202, and the California Unfair Business Practices Act, California Business and Professions Code section 17200 *et seq*.; (2) must pay statutory waiting time penalties pursuant to California Labor Code section 203; and (3) failed to record all hours worked and pay all wages when due pursuant to sections 1831(c) and 1832(a) of the Migrant and Seasonal Agricultural Worker Protection Act[3] ("AWPA").[4] *See* Brief, p. 23.

II. SUMMARY JUDGMENT STANDARD

A motion for summary judgment should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c)); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party bears the initial burden of informing the Court of the basis for the motion and identifying portions of the pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the absence of a triable issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

If the moving party meets its initial burden, the burden shifts to the nonmoving party to present specific facts showing that there is a genuine issue of material fact for trial. FED. R. CIV. P. 56(e); *Celotex Corp.*, 477 U.S. at 324. The evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the nonmoving party. *T.W. Elec. Service, Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir. 1987). Summary judgment is not appropriate if the nonmoving party presents evidence from which a reasonable jury could resolve the material issue in his or her favor. *Barlow v. Ground*, 943 F.2d 1132, 1136 (9th Cir. 1991).

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[2] *See Morillion v. Royal Packing Co.*, 22 Cal.4th 575, 581 (Cal. 2000), and *Indus. Welfare Comm'n v. Superior Court*, 166 Cal.Rptr. 331 (Cal. 1980), for a description of the IWC and its orders and an interpretation of Wage Order No. 14-80.

[3] 29 U.S.C. § 1801 *et seq*.

[4] Plaintiffs do not seek summary judgment as to one of their original class claims (that D'Arrigo violated section 1832(c) of AWPA) or to individual claims of Plaintiffs. Plaintiffs state that they will dismiss these claims voluntarily if summary judgment is granted as to the remaining class claims. *See* Brief, p. 3.

However, the more implausible the claim or defense asserted by the nonmoving party, the more persuasive its evidence must be to avoid summary judgment. *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1389 (9th Cir. 1990). The standard applied to a motion seeking partial summary judgment is identical to the standard applied to a motion seeking summary judgment of the entire case. *Urantia Found. v. Maaherra*, 895 F.Supp. 1335, 1335 (D. Ariz. 1995).

III. ANALYSIS

A. D'Arrigo's Method of Compensation Failed to Comply with AWPA.

Plaintiffs seek unpaid wages and statutory penalties arising from D'Arrigo's alleged failure to pay Plaintiffs for time that D'Arrigo compelled them to spend waiting and traveling to and from work sites on D'Arrigo's vehicles between August 4, 1996 and April 14, 2000. Plaintiffs argue that summary judgment should be granted because there is no disputed genuine issue of material fact that Plaintiffs were not paid for such travel and waiting time.

AWPA requires an agricultural employer to keep accurate records of time worked and to pay seasonal workers all wages when due. This Court has held that AWPA's requirements are triggered if state law, in particular California's Wage Order No. 14-80 and the California Labor Code, specifies that wages are due. *See Medrano v. D'Arrigo Bros. Co. of Cal.*, 125 F.Supp.2d 1163, 1167 (N.D. Cal. 2000).

Section 4 of Wage Order No. 14-80 requires an agricultural employer to pay agricultural workers a specified minimum wage for "all hours worked." Section 4(b) provides: "Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise." The California Supreme Court held in *Morillion* that all time agricultural workers spend under the employer's control, including specifically compulsory travel and waiting time, must be considered "hours worked" pursuant to Wage Order No. 14-80. *Morillion v. Royal Packing Co.*, 22 Cal.4th 575, 587 (Cal. 2000). Thus, according to Wage Order No. 14-80, although D'Arrigo may use various schemes to compensate Plaintiffs, it nonetheless must pay its workers enough to compensate for

compulsory waiting and travel time. Both the language of Wage Order No. 14-80 and the California Supreme Court's reasoning *in Morillion* suggest that an employer may use varied payment schemes[5] as long as the agricultural worker is paid no less than the sum the worker would have been paid during the pay period if the employer paid according to the following formula: number of hours worked (including compulsory waiting and travel time) during the pay period multiplied by the minimum wage set forth in Wage Order No. 14-80. Accordingly, D'Arrigo is liable if it paid the agricultural workers less than what Wage Order No. 14-80 required during a pay period, regardless of how it determined the wages that it paid its employees.

D'Arrigo essentially concedes that it did *not* compensate Plaintiffs *directly* for compulsory waiting and travel time, in that it did not record travel and waiting time and pay wages for those hours worked. *See, e.g.*, Opposition, p. 19:23-24; Plaintiffs' Brief, Ex. 6 (Paz Depo. at 60). It nonetheless argues that it compensated Plaintiffs for such time *indirectly* via its piece-rate payment scheme. At the same time, it admits that it followed the "practice of compensating employees for the 'greater of the day,' meaning employees received either the piece-rate or guaranteed hourly minimum, whichever was greater for that day."[6] Opposition, p. 23:8-10. As already noted, the guaranteed hourly minimum scheme did not take travel time into account directly. Thus, even accepting D'Arrigo's position, there clearly were at least some instances in which Plaintiffs were not compensated, even *indirectly*, for travel time.

However, the dispositive issue for the purposes of the present motion is not whether D'Arrigo paid directly or indirectly for compulsory travel and waiting time, but rather whether its payment schemes, whether based on piece rate or a minimum hourly wage, were insufficient pursuant to Wage Order No. 14-80. That is, the threshold question for determining liability is

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[5] For example, Wage Order No. 14-80 specifically states that the piece-rate scheme is an appropriate payment plan, yet the piece-rate scheme does not include consideration of a minimum wage or the number of hours worked.

[6] Additionally, some employees were never compensated via the piece-rate plan. *See, e.g.*, Plaintiffs' Ex. 2 (Snell Depo. at 42-43 & 46).

whether payment during a pay period in fact fell below that required by Wage Order No. 14-80 when compulsory waiting and travel time are taken into account. It is undisputed that payments according to the piece rate scheme always were greater than those made according to D'Arrigo's minimum wage. It also is undisputed that sometimes employees were paid according to D'Arrigo's minimum wage. Accordingly, if D'Arrigo's minimum wage always compensated employees in an amount greater than that required by Wage Order No. 14-80 and *Morillion*, even if travel and waiting time were not included in the calculation, then D'Arrigo could not be liable for violating the requirements of Wage Order No. 14-80.

It is undisputed, however, that D'Arrigo failed to keep records of the time that employees spent traveling and waiting while under its control. Its Executive Vice President, James R. Manassero, stated that, while he *thought* employees were compensated for travel time via piece rate payments, the amount of time spent traveling was not recorded. D'Arrigo thus violated section 1831(c) of AWPA. Mr. Manassero admitted in his deposition that employees sometimes were required to travel between at least twenty-five and thirty-five minutes each way. Plaintiffs' Brief, Ex. 3 (Manassero Depo., at 43:2 & 51:24). A supervisor testified that some travel times are at least fifty minutes each way, Plaintiffs' Brief, Ex. 4 (Cooper Depo., at 63), and these estimates do not include waiting time. Plaintiffs also have provided evidence (and the Court takes judicial notice) that some travel times were at least thirty-seven minutes each way. Reply, Exs. 1 & 4.

The Court concludes on the basis of this undisputed evidence that D'Arrigo must have undercompensated Plaintiffs in at least some instances regardless of what payment scheme it used. For example, D'Arrigo's minimum hourly wage appears to have been $6 during some part of 1997 and $7.05 during some part of 1998. *See* Plaintiffs' Brief, Exs. 2 (Wage Schedule attachment to Gega Letter, Oct. 19, 1998, Art. 32.1.A.1) & 11 (Gega Letter, Mar. 24, 1997). Wage Order No. 14-80 set forth a minimum wage of $5 effective March 1997 and $5.75 effective March 1, 1998. Thus, if an employee worked for eight hours in the field and traveled and waited

a total of two hours during the day,[7] D'Arrigo would have paid the employee $48 per day during at least part of 1997[8] and $56.40 per day during at least part of 1998[9] if it paid according to its minimum wage plan. However, Wage Order No. 14-80 would have required payment of $50 per day during an equivalent part of 1997[10] and $57.50 per day during an equivalent part of 1998.[11]

Indeed, the available[12] evidence from D'Arrigo's database, *see* Soule Decl., ¶ 3, confirms that in a sample of the computer records for travel to just three of the ranches, Plaintiffs were paid less than the average minimum wage 2,114 times from January 1999 to April 2000. Soule Decl., ¶ 14. This is so even if the lowest estimate of travel distance between Spreckels and the

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[7] Testimony indicates that some Plaintiffs traveled at least fifty minutes each way, resulting in a total of one hour and forty minutes of travel time. D'Arrigo did not keep records of travel or waiting time. A reasonable estimate of waiting time is twenty minutes per day, resulting in at least two hours of time that was not factored into D'Arrigo's minimum hourly wage calculation. *See Wales v. Jack M. Berry, Inc.*, 192 F.Supp.2d 1269, 1282 (M.D. Fla. 1999) (finding that "failure to maintain accurate records . . . justifies giving the plaintiffs the benefit of the doubt [and] adjusting the average [number of hours worked per day] upward.").

[8] Eight hours multiplied by $6.

[9] Eight hours multiplied by $7.05.

[10] Ten hours multiplied by $5.

[11] Ten hours multiplied by $5.75.

[12] As of the date on which the present motion was submitted, D'Arrigo still had not provided all of the required computer records. *See* Reply, p. 9. As a result, Magistrate Judge Seeborg imposed sanctions on D'Arrigo for its repeated failure to comply with the Court's discovery orders. The limited records that D'Arrigo did provide were not given to Plaintiffs until January 2004. Under these circumstances, it is disingenuous for D'Arrigo to argue that the Court should disregard Plaintiffs' presentation of information contained in D'Arrigo's computer records on the ground that it, "if considered by the Court, would deprive D'Arrigo of the ability to present a meaningful opposition to the claims set forth therein." D'Arrigo's Objection to Evidence Re: Plaintiffs' Reply, p. 3. The information in the records, which should have been provided more than a year ago and which D'Arrigo has had ample time to consider, does nothing more than indicate the hours per day for which D'Arrigo compensated its employees and the ranches on which they worked. The Court finds D'Arrigo's other objections to the declaration of William Soule to be without merit. Mr. Soule's calculations simply were based on the information contained in D'Arrigo's computer records. Accordingly, D'Arrigo cannot prevail by arguing that Soule did not have personal knowledge or that he is unqualified to give expert testimony.

work sites consistent with the evidence is used. Soule Decl., ¶ 10. The evidence contained in D'Arrigo's own computer records, in combination with the general calculations set forth above, indicate that there is no genuine issue of material fact that D'Arrigo, at least on some occasions, underpaid Plaintiffs for work during the day. To the extent that it suggests that the evidence does not establish underpayment conclusively, D'Arrigo must bear full responsibility for its repeated failure to comply with the Court's discovery orders. *See* Footnotes 7 & 12. Once D'Arrigo complies with Magistrate Judge Seeborg's order compelling release of all computer records, an appropriate accounting of exactly how much D'Arrigo underpaid all employees can be made.

Finally, D'Arrigo has not offered any evidence that would permit a rational factfinder to determine that it did pay above the minimum required by Wage Order No. 14-80, including compulsory waiting and travel time. Its only comment with respect to the issue of whether its hourly wage payment scheme was sufficient is: "The guaranteed hourly minimum was an hourly wage previously set by Defendant for a given commodity. This hourly minimum was always greater than the California minimum wage in place at the time." Opposition, p. 3 n.2. Even assuming, for purposes of discussion, that this statement is true, it does not address the question of whether D'Arrigo's hourly minimum wage payment scheme provided payments great enough to overcome the effects of its having neglected to include compulsory travel and waiting time in the calculation. The more implausible the claim or defense asserted by the nonmoving party, the more persuasive its evidence must be to avoid summary judgment. *Jackson*, 902 F.2d at 1389.

Pursuant to the California Unfair Business Practices Act, California Business & Professions Code section 17203, Plaintiffs may seek restitution from employers for unpaid earnings; such earnings are considered a vested property right. *See Watson Lab., Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F.Supp.2d 1099, 1123 (C.D. Cal. 2001). California Labor Code section 205.5 requires an employer to pay agricultural workers twice per month. Accordingly, to the extent that D'Arrigo failed to comply with Wage Order No. 14-80 twice per month, Plaintiffs may seek restitution of any unpaid earnings.

B. California Labor Code Section 510 Is Irrelevant to the Present Motion.

As discussed above, section 4 of Wage Order No. 14-80 requires an agricultural employer

to pay its workers a specified minimum wage for "all hours worked," and in *Morillion* the California Supreme Court held that "all hours" includes compulsory travel and waiting time. D'Arrigo argues, however, that Wage Order No. 14-80 conflicts with California Labor Code section 510. Section 510 provides rules for payment for overtime work and specifies what work amounts to "overtime." It qualifies time spent commuting on an employer's vehicle. Specifically, it provides:

> The requirements of this section do not apply to the payment of overtime compensation to an employee working pursuant to any of the following:
> . . .
> (b) Time spent commuting to and from the first place at which an employee's presence is required by the employer shall not be considered to be a part of a day's work, when the employee commutes in a vehicle that is owned, leased, or subsidized by the employer and is used for the purpose of ridesharing, as defined in Section 522 of the Vehicle Code.

As relevant to this case, section 510 does nothing more than specify that overtime wages need not be paid for *noncompulsory* travel time ("time spent commuting to and from *the first place at which an employee's presence is required*"). The term "day's work" in section 510 omits travel time because this provision evidently envisions a scenario in which employers provide discretionary commuting services for employees. In contrast, *Morillion* and the present action concern a situation in which employees were compelled to use the employer's vehicles. In light of this distinction, the California Supreme Court noted that it was "not persuaded that [section 510] clearly applies to plaintiffs' compulsory travel time." *Morillion*, 22 Cal.4th at 590 n.6. The court's statement that "[b]ecause [compulsory travel] time is compensable under the plain language of Wage Order No. 14-80, we decline to determine the exact relationship between Labor Code section 510 and the definition of "hours worked" under Wage Order No. 14-80," *id.*, serves only underscores the applicability of Wage Order No. 14-80 in the present matter.

C. AWPA Applies When Wages Due Are Unpaid.

D'Arrigo argues that AWPA "does not incorporate the substantive provisions of state wage and hour laws and was not intended to be a federal enforcement mechanism for alleged violations of state wage and hour laws." Opposition, p. 13. However, this Court already has

held that 29 U.S.C. § 1832(a) "simply provides that wages must be paid when due, without limiting the source of the obligation," *Medrano*, 125 F.Supp.2d at 1167, and thus "Plaintiffs have alleged a cognizable AWPA claim by alleging that they were not paid wages due to them under California law," *id*. at 1168. For the reasons set forth in that decision, D'Arrigo's argument is untenable.

D. Statutory "Waiting Time" Penalties Might Be Available to Some Class Members.

California Labor Code sections 201 and 202 require an employer to pay all unpaid wages when an employee is discharged or quits. California Labor Code section 203 provides for a penalty of up to thirty-days worth of pay if "an employer willfully fails to pay . . . any wages of an employee who is discharged or who quits."

Plaintiffs argue that there is no genuine issue of material fact that D'Arrigo acted willfully in its failure to pay discharged Plaintiffs. Specifically, D'Arrigo intentionally did not pay for travel time, and "[a]s used in section 203, 'wilful' merely means that the employer failed or refused to perform an act which was required to be done." *Barnhill v. Robert Saunders & Co.*, 125 Cal.App.3d 1, 7 (1981). However, the *Barnhill* court also found that the defendant should not be penalized if the law is unclear and the defendant did not withhold payment in bad faith. It is undisputed in this case that the law was unclear until *Morillion*, which was decided in 2000. In fact, in that case the California Supreme Court overturned the lower court's conclusion that there was no duty to pay for compulsory travel time.

Additionally, seasonal employees such as Plaintiffs are not "discharged" within the meaning of the statute when they are "laid off" during the off-season with the expectation that they will return to work at the onset of the subsequent season. Plaintiffs generally returned the following season, keeping their seniority rights. *See* Opposition, p. 31. Indeed, this Court already has found that "unlike a common law claim requiring payment upon discharge or resignation, the instant claims . . . are asserted by current employees who have not resigned or been discharged." *Medrano*, 125 F.Supp.2d at 1170. Statutory penalties generally are unwarranted.

However, waiting time penalties are applicable to any employees who were *permanently*

discharged after the *Morillion* decision and before this suit was filed and who were not paid at least the minimum wage required by Wage Order No. 14-80 including compulsory waiting and travel time. Only this group of employees is entitled to summary judgment. If Plaintiffs wish to pursue this issue either at a trial or an evidentiary hearing or if D'Arrigo wishes to submit an appropriate motion for summary adjudication with respect to it, the moving party shall advise the Court.

E. Issues to Be Determined at the Post-liability Phase.

D'Arrigo offers several arguments that are not directly relevant to the present motion, the purpose of which is to determine liability. First, it contends that questions of material fact exist as to the extent to which it compensated employees above minimum wage. Second, it argues that some employees were compensated adequately through piece-rate earnings. Third, it asserts that there are questions of material fact as to which job classes were subject to the mandatory busing policy: it offers evidence that cauliflower, celery, fennel, and cactus harvest crews, helpers in lettuce machine and mixed lettuce crews, machine operators and helpers on romaine hearts crews, tractor and equipment movers on broccoli harvest crews, loaders for rappini crews, and thin and hoe crews were excluded. *See, e.g.*, Opposition, p. 2; Plaintiffs' Ex. 2 (Snell Depo. at 37 & 40).

While it is true that these issues may be relevant to D'Arrigo's liability to individual class members, Plaintiffs have shown adequately that at least some class members were compensated below the minimum wage required by Wage Order No. 14-80. To the extent that some class members were not undercompensated during certain pay periods, these class members will not be able to prove damages at the damages phase of the present action. By making a determination that D'Arrigo improperly failed to record and pay for compulsory travel time for at least some employees, the Court is not indicating that all class members necessarily are entitled to damages or determining the damages to which individual class members may be entitled. In the damages phase of this action, Plaintiffs must demonstrate how much they were paid and show that that amount fell below the minimum wage required by Wage Order No. 14-80 and *Morillion*. Similarly, in order to receive waiting time penalties, class members will have to demonstrate that

they were permanently discharged after *Morillion* was decided and before the filing of the present action and that they were not paid the required minimum wage. To the extent that additional issues relative to individual class members, such as whether certain classes of employees were required to ride the bus, require determination by the Court, the parties may submit motions for summary adjudication of those issues.

Plaintiffs suggest that the Court proceed in three phases following determination of liability. First, the class should be notified. Second, Plaintiffs recommend that a special master, to be compensated by D'Arrigo, should determine (1) whether claims submitted after the filing deadline should be allowed and (2) the identity of the claimants. Third, the Court should calculate damages. Plaintiffs concede that D'Arrigo "probably has a right to a jury trial" on the issue of which employees were required to ride the buses and that the parties should submit briefing to determine summarily whether that issue can be adjudicated. Plaintiffs also suggest that if D'Arrigo disagrees with the findings of the special master, it should take up its objections at a trial on damages. It appears, however, that—apart from the question of which subclasses of employees were subject to compulsory travel and waiting—determination of damages likely will require only a technical calculation (using D'Arrigo's payroll computer records) of how much each Plaintiff was paid during a payroll period and a comparison of the result of that calculation with the amount required by state law.

IV. ORDER

Good cause therefore appearing, IT IS HEREBY ORDERED that Plaintiffs' motion for summary judgment is granted as follows:

(1) The Court concludes as a matter of law that Defendant has failed to pay wages due to at least some members of the class on some occasions as required by California Industrial Welfare Commission wage order No. 14-80, California Labor Code section 205.5, the California Unfair Business Practices Act, California Business and Professions Code section 17200 *et seq*., and section 1832(a) of the Migrant and Seasonal Agricultural Worker Protection Act;

(2) The Court concludes as a matter of law that Defendant must pay statutory waiting

time penalties pursuant to California Labor Code section 203 to any employee who was not paid in full—consistent with California Industrial Welfare Commission wage order No. 14-80 and *Morillion v. Royal Packing Co.*, 22 Cal.4th 575 (Cal. 2000)—after being permanently discharged or quitting, after the decision of the California Supreme Court in *Morillion*, and before this action was filed. Summary judgment in favor of Plaintiffs as to this issue as to any other employee is inappropriate and will be denied. The parties shall advise the Court as to whether they plan to pursue subsequent litigation relating to the issue of whether such other employees are owed waiting time penalties; and

(3) The Court concludes as a matter of law that Defendant failed to record all hours worked and pay all wages when due pursuant to section 1831(c) of the Migrant and Seasonal Agricultural Worker Protection Act.

The parties may submit motions for summary adjudication on or before April 5, 2004 limited to the issue of which groups of agricultural workers were required by Defendant to wait and travel on Defendant's buses. However, counsel shall meet and confer prior to filing any such motion in order narrow the scope of the motion to the extent that is possible.

Pursuant to Federal Rule of Civil Procedure 53, the Court will appoint a special master to determine:

(a) whether claims submitted after the filing deadline should be allowed;

(b) the identity of claimants; and

(c) the extent to which Defendant underpaid individual class members during the relevant pay periods.

The parties shall file letter briefs with the Court on or before April 12, 2004 addressing the proposed duties and identity of the special master.

DATED_____

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JEREMY FOGEL
United States District Judge

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